No. 95-1201

In the
Supreme Court of the United States
October Term, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA, and STATE OF CALIFORNIA,
Appellees,

and

STEVEN A. SILLMAN,
Intervenor-Appellee.

On Appeal from the United States District Court for the Northern District of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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31pp

TABLE OF CONTENTS

TABLE OF AUTHORTIES CITED

Page

UNITED STATES CONSTITUTION

MISCELLANEOUS

Page

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees, Monterey County, California, and the State of California. All parties have consented to the

filing of this brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases in the voting rights context before this Court including *Bush v. Vera*, 1996 WL 315857 (June 13, 1996); *Shaw v. Hunt*, 1996 WL 315870 (June 13, 1996); *Hays v. Louisiana*, 515 U.S. ___, 115 S. Ct. 2431 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that to the extent the Voting Rights Act applies to judges, it should be very narrowly construed. Judges are not representatives in the sense that legislators or executives represent those who elect them. Blurring this distinction fosters distrust in the judiciary; a calamity in a society based on the rule of law.[1]

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[1] In its role as amicus curiae, Pacific Legal Foundation focusses on the broader, philosophical aspects which should (continued...)

OPINION BELOW

The November 1, 1995, opinion of the three-judge District Court in *Lopez v. Monterey County, California*, finding that elections for county judges temporarily must be held at-large to avoid unconstitutional racial gerrymandering is not reported. The decision is included in the Joint Appendix (JA) at 165-73.

STATEMENT OF THE CASE

Prior to 1968, Monterey County, California (County), had two Municipal and seven Justice Court districts. JA at 125. Between 1968 and 1983, those districts were consolidated to provide for one Municipal Court district with judges elected at-large from the entire county. *Id.* The consolidation ordinances were subject to review under Section 5 of the Voting Rights Act and Latino residents (led by Vicky Lopez) of the County filed a Section 5 enforcement action seeking declaratory and injunctive relief requiring the County to seek preclearance of the ordinances before enforcing them further. *Id.*

On March 31, 1993, the United States District Court for the Northern District of California (three-judge panel) found that the ordinances did require preclearance and that

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[1] (...continued)
form the framework of the instant case rather than the more specific legal questions which are certain to be briefed at length by the parties.

the ordinances could not be enforced without preclearance. *Id.* In response to the court's order, the County sought after-the-fact preclearance in the United States District Court for the District of Columbia. *Id.* The County then stipulated that the consolidations ordinance did deny the right to vote to Latinos due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. JA at 126.

Monterey County and Lopez came up with two plans for the election of Municipal Court judges. JA at 126-27. The first plan created seven election areas in which only the residents could vote. JA at 126. The areas were to be used solely for election purposes and there would remain only one county-wide Municipal Court district for all other purposes. *Id.* However, this plan conflicted with Article VI, Section 16(b),[2] of the California Constitution by removing the linkage between a judge's electoral and jurisdictional bases. *Id.* Nonetheless, the parties asked the court to authorize the County to adopt the plan and upon such authorization, the County said it would seek preclearance. *Id.* The State of California intervened and objected to the issuance of an order authorizing the plan. *Id.* The District Court did not approve the plan because it was not satisfied that a plan necessarily had to conflict with the California Constitution to comply with the Voting Rights Act. *Id.* The second plan prepared by the parties created four districts and similarly violated Article VI, Section 16(b), of the California Constitution. JA at 127. Again, the District Court ruled that the County must submit for preclearance "an election plan

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[2] In pertinent part, Article VI, Section 16(b), of the California Constitution states: "Judges of other [nonappellate] courts shall be elected in their counties or districts at general elections."

that complied with the Voting Rights Act and all applicable provisions of the California Constitution and state law, or show cause why it could not do so." *Id.*

In a hearing to show cause why it kept submitting plans that create election districts that violate Article VI, Section 16(b), of the California Constitution, the County explained it could not submit a plan for preclearance that does not conflict with at least one state law and still comply with the Voting Rights Act. *Id.* Thereafter, the court enjoined Monterey County from holding elections for Municipal Court judges pending adoption and preclearance of a plan for their election. *Id.* The court ordered the County to take the necessary steps to obtain changes in existing state law and county ordinances to effectuate such a plan. *Id.* Following the court's order, the County sought to secure passage of an amendment to the California Constitution regarding the configuration of Municipal Court districts in Monterey County. JA at 128. These efforts were unsuccessful. *Id.* Lopez and the County then asked the court to allow elections to take place under the four-district plan. *Id.* As an alternative, they asked the court to authorize the County to implement a plan which would include districts that split cities. *Id.* A plan splitting cities also violates Article VI, Section 5(a), of the California Constitution, which prohibits the division of any municipality into two or more Municipal Court districts.

The court implemented the four-district plan as an emergency, interim plan, with the restriction that the terms served by the judges elected pursuant to that plan shall expire on January 1, 1997. JA at 137. The court expressed the expectation that the County and the state would work out the appropriate legislative solution by then. *Id.*

The special election occurred on June 6, 1995. JA at 165. Subsequently, this Court decided *Miller v. Johnson*, __ U.S. __, 115 S. Ct. 2475 (1995), which the District Court correctly found cast serious doubt on the validity of the District Court's interim plan. JA at 167. *Miller*, a racial gerrymandering case relating to Georgia's congressional districts, raised substantial doubt that legislative division of election district based predominantly on race can withstand constitutional scrutiny. *Id.* at 2486. Given this intervening clarification of the law, the District Court issued a new order on November 1, 1995. JA at 165-73. The new order rescinded the interim plan and held that judges will be elected in 1996 by the county-wide at-large system in place before the litigation commenced. JA at 173. The State of California joined the litigation as an indispensable party on the basis of its argument that the County was only administering a *state* statute and, therefore, the failure to preclear the consolidation ordinances is of no significance. *Id.* Meanwhile, the parties were ordered to come up with a permanent election plan. *Id.*

Lopez appealed the decision rescinding the emergency interim plan to this Court, which noted probable jurisdiction on April 1, 1996.

SUMMARY OF ARGUMENT

The linchpin of the American judiciary is the impartiality of its judges. Litigants must abide by decisions whether they agree with them or not. By requiring judges to "reflect," "be responsive to," or "represent" a discrete constituency, the impartiality that is crucial to the administration of justice is lost. The smaller the constituency, the greater the pressure on judges to conform to local concerns.

Far from representing a particular group of people, the judiciary is meant to be the antimajoritarian branch of government.

Equating the judiciary with the truly representative branches of government destroys the check the judiciary has over those branches. Subdistricting judgeships would devastate the judicial election systems in California--in which no intentional discrimination has occurred. Moreover, such micromanagement by the federal government in the absence of discriminatory conduct by the state infringes on the state sovereignty as protected by the Tenth Amendment. Because the court below determined that the racially based subdivisions for judicial elections contravened the traditional districting principles set forth in the California Constitution, the court correctly reinstalled the at-large elections until such time as the state, County, and appellants can devise a plan which complies with both the Voting Rights Act and state districting requirements.

ARGUMENT

I

JUDGES HAVE A SPECIAL ROLE DISTINCT FROM THE LEGISLATIVE OR EXECUTIVE BRANCHES

Because judges and legislators serve different functions, this Court recognizes that judicial and legislative elections raise different concerns. For example, while this Court permits virtually no deviation from the one-person, one-vote principle in legislative elections (*Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962)), there is far greater leeway in drawing judicial electoral

boundaries to facilitate judicial administration (*Wells v. Edwards*, 409 U.S. 1095 (1973)).

Judicial elections are unique compared to elections for legislative and administrative offices. Not only do most judicial candidates fail to run aggressive or partisan campaigns, some judges do not campaign at all in elections. *Chisom v. Roemer*, 501 U.S. at 400; *Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988). Judicial elections are distinguished by lower levels of turnout and voter roll-off, less competition and greater reliance by the voters on yfactors such as incumbency, previous judicial experience, and party affiliation[3] in making choices among competing candidates. Weber, *The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective*, 73 JUDICATURE 85, 86 (1989). Thus, this Court should exercise caution in reaching conclusions about voter polarization and dilution in judicial elections based on past experience with elections for legislative and executive offices.

As discussed below, the very dramatic distinctions between the judicial branch of government and the legislative branch must inform any application of the Voting Rights Act to judicial elections.

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[3] *See* Chapman, *Judicial Roulette, Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections*, 48 S.M.U. L. REV. 457, 479-80 (1995), for extreme examples of partisanship in state judicial elections.

A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group

By dividing a county into subdistricts, the District Court would dramatically alter elected judges' independence and appearance of impartiality. Rather than enjoying the independence that accompanies accountability to the entire electorate, judges would be rendered beholden to a small portion of those appearing in court. Rather than being free to eradicate a nuisance in their own neighborhoods, judges may be pressured to allow that nuisance to continue if they intend to remain in office.[4] The American judicial system relies on citizens to abide to court rulings, whether or not they agree or disagree with such rulings. It is therefore of fundamental importance that the judges handing down the rulings be perceived as being fair and unbiased.

Electing state district judges from single-member districts would destroy the integrity of the unit. Decision making would become fragmented along the same lines as the districts into which the unit is carved. The judge would not reflect values of the whole community. Judges who appear to favor litigants from their subdistricts over litigants from other parts of the electoral district will undermine confidence in the judiciary. If the people believe that the judiciary is biased, regardless of whether it actually is biased, the

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[4] This Court has recognized the tension that exists for a popularly elected judge in remaining true to the law. "'Financing a campaign, soliciting votes, and attempting to establish charisma or name identification are, at the very least, unseemly for judicial candidates' because 'it is the business of judges to be indifferent to popularity.'" Stevens, *The Office of an Office*, CHICAGO BAR REC. 276, 280, 281 (1974), *cited in Chisom v. Roemer*, 501 U.S. at 401 n.29.

effectiveness of the judiciary will be compromised. Izatt, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act*, 1996 U. ILL. L. REV. 229, 246 (1996).

Although the appellants seek subdistricting to improve judges' responsiveness to minorities (*see* Appellants' Brief at 5-7), creating subdistricts will not have the same impact on minority representation as it has in legislative elections. In legislative and administrative elections, officials are elected from a political subdivision to represent their constituents. The elected officials become part of a political decision-making body, such as a city council, school board, or legislature. Elected representatives form a collegial body charged with the responsibility of making decisions that reflect the policy preferences of their constituents. In the legislative/administrative context, single-member district elections ensure racial and language minority groups have the opportunity to elect individuals who will represent their interests--to the extent that race or language alone can define a cohesive community. (Even this contention, raised in the legislative context, raises the specter of racial stereotyping expressly disapproved by this Court in *Miller*, 115 S. Ct. at 2486, and *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 2824-25 (1993).) However, in judicial districts, even in districts with two or more judges, trial court judges do not act as a group. Each judge is responsible for a specific portion of the caseload. Judges do not negotiate, discuss, compromise, or engage in give-and-take when deciding cases. Each judge acts alone in applying the law to the case at hand.[5]

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[5] This Court commented on this phenomenon in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419, by relating the concurring opinion of (continued...)

A corollary effect to subdistricting would be an increase in litigants' desire to forum shop. If judges are known to be responsive to a particular constituency, a member of that constituency will naturally seek to have his legal matters brought to that particular member of the judiciary. American jurisprudence has generally shown hostility to forum shopping. For example, the historical basis of diversity jurisdiction was to protect nondomiciliaries from local prejudice. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098, *reh'g denied*, 445 U.S. 947 (1980). The theory on which jurisdiction is conferred on federal courts in controversies between citizens of different states has its foundation in the supposition that the state tribunal may not be impartial between its own citizens and nonresidents. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855).

At one time the removal jurisdiction statute, 28 U.S.C. § 1441, expressly listed local bias as a reason for removal. 28 U.S.C. § 1441, historical note. All of the

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[5](...continued)
Judge Higginbotham to the decision under review. Judge Higginbotham argued that minority influence was lessened by making "only a few district court judges principally accountable to minority electorate rather than making all of the district's judges partly accountable to minority voters." *League of United Latin American Citizens Council v. Attorney General of Texas*, 914 F.2d 620, 649-51 (5th Cir. 1990), *cited in Houston Lawyers' Association*, 501 U.S. at 424. This Court did not deny the merit of this argument, instead choosing to "deliberately avoid any evaluation of the merits of the concerns expressed in Judge Higginbotham's opinion." *Houston Lawyers' Association*, 501 U.S. at 426.

provisions with reference to removal because of the inability, due to prejudice or local influence, to obtain justice, have since been discarded. The historical note to Section 1441 explains that "[t]hese provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." *Id.* So much has been done to eradicate biases; the subdistricting of judicial election districts is a swing in the wrong direction.

One of the major purposes of this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), was to eliminate or drastically curtail the evil of forum shopping. *Id.* at 74-75. The twin aims of the *Erie* rule were characterized by this Court as "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). The *Hanna* decision viewed *Erie* as a reaction to the practice of forum shopping that developed in the wake of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Hanna*, 380 U.S. at 467. *See Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1928) (diversity jurisdiction existed although plaintiff reincorporated solely to create diversity); *see also O'Brien v. Avco Corp.*, 425 F.2d 1030, 1036 (2d Cir. 1969) (administrator was appointed to secure a federal forum because of alleged prejudice in state court; federal court viewed appointment "as a blatant example of precisely the type of forum-shopping that [the anticollusion statute] and cases like *Erie R.R. Co. v. Tompkins* ... were designed to prevent").

Additionally, the federal courts have consistently held that large multimember districts preserve judicial independence in the face of organized political interests groups. *See, e.g., Nipper v. Smith*, 39 F.3d 1494, 1556-57 (11th Cir. 1994) (plaintiffs argued that imposing subdistricting would

"unduly erode the independence of judges"); *League of United Latin American Citizens v. Clements*, 986 F.2d 728, 769-71 (5th Cir.), *rev'd*, 999 F.2d 831 (5th Cir. 1993) (*en banc*) (*LULAC III*) (stating that small single-member districts would make judges beholden to the particular racial group that elected them), *cert. denied*, __ U.S. __, 114 S. Ct. 878 (1994); *Nipper v. Chiles*, 795 F. Supp. 1525, 1547 (M.D. Fla. 1992) (agreeing with the state that the at-large nature of the challenged judicial electoral system creating a link between a judge's jurisdiction and elective base fosters judicial independence or at least the appearance of judicial independence), *rev'd sub nom. Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993), *vacated*, 17 F.3d 1352 (11th Cir. 1994); *Magnolia Bar Association v. Lee*, 793 F. Supp. 1386 (S.D. Miss. 1992) (stating that judges are more independent in large districts than in small ones), *aff'd*, 994 F.2d 1143 (5th Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 555 (1993); *Southern Christian Leadership Conference v. Evans*, 785 F. Supp. 1469, 1479-80 (M.D. Ala. 1992) (determining a Voting Rights Act violation is more difficult in judicial elections than in others), *aff'd*, 56 F.3d 1281 (11th Cir. 1995), *cert. denied*, __ U.S. __, 64 U.S.L.W. 3453 (Jan. 8, 1996) (No. 95-647); *Clark v. Roemer*, 777 F. Supp. 471, 476 (M.D. La. 1991) (admitting evidence supporting the conclusion that longer terms and bigger election districts for the Courts of Appeal promote objectivity and detachment from local issues), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992).

Subdistricting robs judges of their independence by focusing a very narrow band of public opinion over their decision-making process. Yet appellants seek a court order in this case requiring what the District Court now views as a violation of the Fourteenth Amendment: subdistricting along racial lines with judges responsive to public opinion in their districts. Public opinion is an uncertain and constantly

shifting barometer of community emotion. Public opinion gives little consideration to the determinations of law and fact at issue in a case. Public opinion is concerned solely with results. *See Judicial Roulette*, 48 S.M.U. L. REV. at 467-68. Certainly, most judges set aside concern for their reelection standing and render decisions without regard for such considerations. However, a party on the losing side of a court decision or ruling affecting life, liberty, or property should not be left to wonder whether that decision or ruling was influenced by public opinion and prospects for reelection.

B. The Judiciary Performs an Antimajoritarian Role

Although this case involves state judges, the United States Constitution's treatment of the federal judiciary provides a compelling analogy to the special role expected of state judiciaries.

The framers of the Constitution intended judges and legislative representatives to be treated differently under the law. These officials are provided for in different articles in the body of the Constitution. U.S. Const. Arts. I and III.[6]

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[6] The California Constitution mirrors the federal Constitution with regard to separation of powers. Cal. Const. Art. III, § 3, provides:

> The powers of state government are legislative, the executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

The California Constitution provides for legislative power in Article IV and judicial power in Article VI.

Further, the difference between legislative representatives, who curry favor with their constituents, and judges, who do not, is accentuated by the framers' recital of the duties and prohibitions of the respective offices. Judges simply cannot be considered "representatives" in the usual sense of the term because they do not have a constituency. Judges, be they trial or appellate, should apply the law as they see it, without a political agenda or interest.

Alexander Hamilton, in a sequence of Federalist Papers, stressed the importance of an independent judiciary. Far from equating judicial officers with "representatives," he expressed concern that the judiciary be free from the "encroachments and oppressions" of the representative body. The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). The independent judiciary was held up to be "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." *Id.*

Not only was the judicial branch created to be nonrepresentative, but Hamilton asserted that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Id.* at 466 (quoting Montesquieu, *Spirit of Laws*, Vol. 1, at 186 (1750)). Furthermore, Hamilton was fully aware of the ever-changing whims of public opinion. Hence, the antimajoritarian role of the judiciary is clear:

> [I]t is not to be inferred ... that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the ... Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts

> would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body.

Id. at 469-70.

Hamilton cautioned strongly against allowing an independent judiciary to be infiltrated by a sense of responsiveness to segments of the community. The injection of public opinion only makes the work of a judge more difficult. *Id.* at 470.

Necessarily, judges' decisions may not reflect the majority will. Their decisions often must enforce constitutional guarantees in the face of majority opposition. As Justice Scalia noted in *Chisom v. Roemer*, 501 U.S. at 411 (Scalia, J., dissenting), "it is the prosecutor who represents 'the People'; the judge represents the Law--which often requires him to rule against the People." To fulfill this role, judges should be motivated solely by principle, not by perceived ties to constituents. A judge should never have to worry that an unpopular decision alone will cast him out of the judiciary.

Electors do serve, however, as a tool to rein in those members of the judiciary who see their role as one of making law rather than interpreting it. In no event, however, does the election create a duty to represent a particular constituency. Any hint to the contrary would render state courts unable to provide simple due process of law. Commentators note:

> A realist perspective recognizes the dual characteristics of the judiciary: the public wants judges to be independent and impartial, but also seeks judges that are accountable to

> citizens and sensitive to the impact of judicial decisions on society. Although tension exists in judicial performance of these twin roles, they are not inherently contradictory. Both functions emanate from a concern to safeguard the integrity and authority of the democratic political process.

Saks, *Redemption or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act*, 66 CHI.-KENT L. REV. 245, 276 (1990).[7] California's approach to this balancing act is reflected in its constitutional provisions linking electoral and jurisdictional bases (Article VI, Section 16(b)), and maintaining the integrity of political subdivisions as an electoral community of interest (Article VI, Section 5). Given the special constitutional role of judges analyzed above, this Court should commend the District Court's order that avoided rendering judges more like legislators. This Court should further affirm that the District Court's caution was amply warranted by the Fourteenth Amendment and the expressed wishes of the people of California.

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[7] *See also* Canon, *Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges*, 77 KY. L.J. 747, 757 (1989), arguing that while judges should not be spineless politicians following the whims of every transient majority or helping to whip up the passions of the day, their devotion to logic or principles should not be so great that they are disdainful of the actual consequences their decisions have on society. Canon concludes that "[t]he Grail of perpetually balanced judicial accountability and independence will never be found, but we should not abandon the search." *Id.*

II

EXPANDING THE BREADTH OF SECTION 5 PRECLEARANCE PROCEEDINGS VIOLATES THE TENTH AMENDMENT

Courts should not compel states to adopt remedial measures that contravene state laws codifying important state interests. *Magnolia Bar Association v. Lee*, 793 F. Supp. at 1417. The theoretical basis for this assertion originates in a long line of Supreme Court cases recognizing the right of a state to assert its sovereignty by defining who will, and who will not, exercise governmental authority. *Gregory v. Ashcroft*, 501 U.S. 452, 457, 472-73 (1991) (finding that Article V of the United States Constitution grants the people of Missouri the right to determine whether judges must retire by a certain age); *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900) ("It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."); *Boyd v. Nebraska, ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen."). Wholesale changes or intrusive alterations of the nature and operation of a state's judicial branch violate the principles of federalism ensconced in the Tenth Amendment to the United States Constitution.[8] This Court has, in just the past few years, more fully explored the scope of this constitutional provision.

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[8] The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Gregory v. Ashcroft*, 501 U.S. 452, this Court read the Age Discrimination in Employment Act narrowly to avoid a construction that would have overturned Missouri's mandatory retirement age for state judges. "Through the structure of its government," the Court commented, "and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460. Thus, Missouri's decision to retire judges at age 70 was the "prerogative" of "citizens of a sovereign State." *Id.* at 473. The federal government cannot tell the states to retain judges over the age of 70, because that command would destroy the ability of state citizens to "choose their own officers for governmental administration." *In re Duncan*, 139 U.S. 449, 461 (1891).

In *New York v. United States*, 505 U.S. 144 (1992), this Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b, because the provision commanded states either to enact laws regulating the disposal of low-level radioactive waste or to take title to all low-level radioactive waste generated within their borders. The Court distinguished firmly between congressional power "to pass laws requiring or prohibiting certain acts" by private parties and congressional attempts "to compel the States to require or prohibit those acts." *Id.* at 165. The former is consistent with the Supremacy Clause, while the latter destroys the accountability of state officials to their electorate. *Id.* at 178-79. Congress, therefore, could not "simply ... direct the States to provide for the disposal of the radioactive waste generated within their borders." *Id.* at 188.

In the context of the Voting Rights Act, federal judges, as well as the Department of Justice, should similarly

respect state sovereignty.[9] Members of this Court have long recognized that Section 5 of the Voting Rights Act, even with its plain language construction (in contrast with the Justice Department's broad interpretation), mandates severe intrusion by the federal government into state electoral autonomy. Justice Black wrote:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

South Carolina v. Katzenbach, 383 U.S. 301, 359-60 (1966) (Black, J., concurring in part and dissenting in part). Even though the majority opinion in *Katzenbach*, 383 U.S. at 335, upheld Section 5 as necessary and constitutional, the limitations on Section 5's intrusiveness were recognized in *Miller*, 115 S. Ct. at 2493: "As we recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must be consistent 'with the letter and spirit of the constitution.'" *Katzenbach*, 383 U.S. at 326, *cited in Miller*, 115 S. Ct. at 2493.

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[9] One commentator suggests that state sovereignty also warrants protection under Article IV, Section 4, of the United States Constitution--the Guarantee Clause. *See generally* Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994).

A state's sovereignty, consistent with the Tenth Amendment, must be recognized in determining the extent to which federal courts and the Justice Department will be permitted to restructure election changes made without discrimination. Federalism concerns consistent with the Tenth Amendment have been formalized by the rule that a statute will not be construed to undercut state authority unless there is a showing of the "unambiguous intent" of Congress to effect the purpose. *New York v. United States*, 505 U.S. at 171. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Even as construed in *Beer v. United States*, 425 U.S. 130 (1976) (announcing retrogression principle), Section 5 is indisputably a serious intrusion into the normal federal-state balance of authority. *See, e.g., United States v. Board of Commissioners*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). To go beyond the retrogression limits of the freezing remedy permitted by *Beer* would be a huge extension of Section 5, an extension for which there is a glaring absence of the necessary "clear statement" from Congress. Without congressional intent, and with the understanding that racially drawn district lines violate the Fourteenth Amendment, the District Court correctly refused to infringe upon the constitutionally protected sovereignty of the State of California.

In *Chisom v. Roemer*, Justice Scalia wrote in dissent that "Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination." *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).[10] The same

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[10] Section 2 is codified at 42 U.S.C. § 1973(a).

sentiment is even more true for Section 5.[11] The burden placed on California by the court below has the potential to require California to totally rework its state judicial election system, despite the state constitutional requirements. In a case where no intentional discrimination exists, a federal court should not encourage the dramatic alteration of the state system.

CONCLUSION

To ascribe particular sets of views to judges because of the color of their skin is clearly in error. Yet the appellants seem to believe that only a member of a minority group will be responsive to the interests of that group, even when the members of the minority group themselves do not believe that to be true. This Court should hold that the District Court correctly ruled that Monterey County and the State of California need not implement, at least on an interim basis, subdistricted judgeship elections. Municipal Court judges elected by individuals divvied up into racial segments of the population would be accountable, as "representatives," to a smaller, more ethnically and racially homogenous population in violation of the Fourteenth Amendment. The District Court correctly ruled to avoid that unconstitutional result.

Requiring judges to be "representatives" insults not only the judges who sit on the bench, but the entire elec-

[11] This Court has twice found "insupportable" the Department of Justice's heavy-handed application of Section 5 to require states to maximize the number of minority districts. *Shaw v. Hunt*, 1996 WL 315870 at *8 (citing *Miller*, 115 S. Ct. at 2492).

torate. To hold, in effect, that a Hispanic litigant is more likely to receive a sympathetic ear from a Hispanic judge, who will not ignore minority interests, *see Thornburg v. Gingles*, 478 U.S. 30, 48 n.14 (1986), impugns the integrity of both Hispanic and non-Hispanic judges. Judges of all races, creeds, and colors are presumed to be impartial; presumed to decide cases on the merits, not on the color or political persuasion of the litigants. Moreover, to require a state to violate the nondiscriminatory provisions of its constitution in a way which furthers the goal of racial division violates the Tenth Amendment.

For the reasons expressed above, the decision of the District Court for the Northern District of California should be affirmed.

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Respectfully submitted,

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